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SJC-13241

IN THE MATTER OF VALERIANO DIVIACCHI.

December 5, 2022.

Attorney at Law, Suspension, Reinstatement. Board of Bar Overseers.

The petitioner, Valeriano Diviacchi, appeals from an order of a single justice of this court denying his second petition for reinstatement to the practice of law, as recommended by the Board of Bar Overseers (board). We affirm.

Background. Diviacchi was suspended from the practice of law for a period of twenty-seven months, effective January 2, 2016, after he was found to have violated several of the Massachusetts rules of professional conduct. See Matter of Diviacchi, 475 Mass. 1013, 1021 (2016) (Diviacchi I). A hearing committee of the board concluded, and the board agreed, that Diviacchi, in connection with his representation of a client in a Federal action filed against her by a lender,

- "(1) violated Mass. R. Prof. C. 1.5 (f)[, as appearing in 459 Mass. 1301 (2011),] by entering into a contingent fee agreement that included provisions not contained in Form A or B without explaining these provisions to the client and without obtaining her informed consent, confirmed in writing;
- "(2) violated Mass. R. Prof. C. 1.1, [426 Mass. 1308 (1998);] 1.2 (a), [426 Mass. 1310 (1998);] and 1.3[, 426 Mass. 1313 (1998),] by refusing to further the client's lawful objective of attempting to halt the foreclosure, a goal that he knew was important to the client, because doing so would risk harm to the predatory lending

counterclaim which he hoped would be the source of his fee, by refusing to meet and talk with the client despite her begging, by refusing to participate in settlement discussions, and by unilaterally limiting his representation despite describing himself as 'counsel of record for all purposes' in his Federal court appearance;

- "(3) violated Mass. R. Prof. C. 3.3 (a) (1)[, 426 Mass. 1383 (1998),] and 8.4 (c)[, 426 Mass. 1429 (1998),] by knowingly making false statements of material fact to both the Federal court and the [Boston Municipal Court (BMC)][1] . . .; and
- "(4) violated Mass. R. Prof. C. 1.5 (a)[, as appearing in 459 Mass. 1301 (2011),] by claiming in the Federal court and the BMC that the client owed him approximately \$96,000 in attorney's fees, where no contingency on which to ground such recovery had occurred and where the attorney-client relationship had effectively ended well before the sale of the house, a transaction in which Diviacchi did not participate in any event."²

<u>Diviacchi I</u>, 475 Mass. at 1018. We affirmed the order of a single justice of this court imposing a term suspension. <u>Id</u>. at 1021.

In 2018, Diviacchi filed his first petition for reinstatement, which was transmitted to the board. See <u>Matter of Diviacchi</u>, 480 Mass. 1016 (2018) (<u>Diviacchi II</u>). In connection therewith, he filed a motion in the county court requesting that the board be compelled to hold a hearing despite his objections to providing certain information required by the reinstatement questionnaire.³ Id. at 1016. A second single

¹ Those false statements included a baseless allegation, made without reasonably diligent inquiry, that the client had a pattern of hiring attorneys, refusing to pay their bills, and reporting them to the board, and that she had repeated this pattern with at least fifteen attorneys. Matter of Diviacchi, 475 Mass. 1013, 1017, 1020 (2016).

 $^{^2}$ The facts underlying these conclusions are more fully set forth in Diviacchi I, 475 Mass. at 1014-1017.

³ Diviacchi continues to object to this aspect of the reinstatement questionnaire, arguing that requiring him to produce certain financial information constitutes an unlawful

justice denied the motion to compel and declined to review Diviacchi's objections. <u>Id</u>. Diviacchi's appeal from that interlocutory ruling was dismissed. <u>Id</u>. Thereafter, a hearing committee of the board held a hearing on the petition and recommended that reinstatement be denied on the ground that Diviacchi had not carried his "burden of demonstrating that he . . ha[d] the moral qualifications, competency and learning in the law required for admission to practice law in this Commonwealth, and that his . . resumption of the practice of law [would] not be detrimental to the integrity of the bar, the administration of justice or the public interest." See S.J.C. Rule 4:01, § 18 (5), as appearing in 453 Mass. 1315 (2019). The board adopted that recommendation, and a single justice of this court denied reinstatement. Diviacchi did not appeal from the single justice's judgment.

Diviacchi thereafter filed his second petition for reinstatement, which also was transmitted to the board. A hearing committee held a hearing and issued a report recommending that reinstatement be denied, in part because the committee was "not persuaded that anything of consequence ha[d] changed since the petitioner's suspension and since the denial of his first petition for reinstatement." The board adopted the hearing committee's findings and recommendation and filed an information in the county court, recommending that the second petition be denied. The second single justice of this court concluded that the hearing committee's findings were supported by substantial evidence and denied reinstatement.

<u>Discussion</u>. The case is now before us on Diviacchi's preliminary memorandum, pursuant to S.J.C. Rule 2:23 (b), 471 Mass. 1303 (2015). That rule requires

"the appellant to demonstrate . . . that there has been an error of law or abuse of discretion by the single justice; that the decision is not supported by substantial evidence; that the sanction is markedly disparate from the sanctions imposed in other cases involving similar circumstances; or

search and seizure. Ultimately, he elected to provide the information, and it was admitted subject to a protective order. See <u>Matter of Diviacchi</u>, 480 Mass. 1016, 1016 (2018) ("He may choose to provide the information requested on the reinstatement questionnaire, or he may maintain his objections to doing so"). In any event, the issue appears not to have factored in the board's decision. In the circumstances, we need not consider it further.

that for other reasons the decision will result in a substantial injustice."

Diviacchi has not carried his burden under the rule.

"A petitioner for reinstatement must demonstrate that he or she 'has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth, and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest.'" Matter of Leo, 484 Mass. 1050, 1051 (2020), quoting Matter of Weiss, 474 Mass. 1001, 1002 (2016). See S.J.C. Rule 4.01, § 18 (5). The hearing committee found that Diviacchi had demonstrated none of these requirements. The single justice agreed, and so do we.

Moral qualifications. The conduct giving rise to Diviacchi's term suspension is "conclusive evidence that he was, at the time, morally unfit to practice law, and it continued to be evidence of his lack of moral character . . . when he petitioned for reinstatement." Matter of Leo, 484 Mass. at 1051, quoting Matter of Dawkins, 432 Mass. 1009, 1010 (2000). See Matter of Fletcher, 466 Mass. 1018, 1020 (2013). We emphasize that this is not a proceeding to review the validity of the underlying discipline. See Matter of Leo, supra at 1051 n.4. See also Matter of Hiss, 368 Mass. 447, 450 (1975). the facts of Diviacchi's misconduct and the professional consequences thereof were established in those proceedings, and Diviacchi had ample opportunity at that time to be heard by the board, the single justice, and this court. See Diviacchi I, 475 Mass. at 1018-1020. Although Diviacchi continues to insist that the findings underlying his suspension are factually false and he disputes them at length, we consider them to be conclusively established. We will not permit him to relitigate those findings.

Having been disciplined for conduct evincing unfitness to practice, Diviacchi "therefore bears the burden of demonstrating that, during the period of suspension, he has 'redeemed himself and become "a person proper to be held out by the court to the public as trustworthy."'" Matter of Leo, 484 Mass. at 1051, quoting Matter of Dawkins, 432 Mass. at 1010-1011. That said, we do not require a petitioner for reinstatement to admit his or her wrongdoing and to repent of it in order to be reinstated. We recognized in Matter of Hiss, 368 Mass. at 457-458, that "[t]he continued assertion of innocence in the face of prior

conviction^[4] does not, as might be argued, constitute conclusive proof of lack of the necessary moral character to merit reinstatement. . . [A] convicted person may on sincere reasoning believe himself to be innocent. We also take cognizance . . . that miscarriages of justice are possible." Accordingly, we do not "disqualify a petitioner for reinstatement solely because he continues to protest his innocence Repentance or lack of repentance is evidence, like any other, to be considered in the evaluation of a petitioner's character and of the likely repercussions of his requested reinstatement." Id. at 459. In this case, despite his argument to the contrary, Diviacchi's refusal to acknowledge the "nature, effects, or implications of [his] misconduct" properly was considered by the hearing committee. Matter of Zankowski, 487 Mass. 140, 153 (2021).

In the end, Diviacchi failed to carry his heavy burden to establish that "he has redeemed himself and become 'a person proper to be held out by the court to the public as trustworthy.'" Matter of Leo, 484 Mass. at 1051, quoting Matter of Dawkins, 432 Mass. at 1010-1011. We need not belabor the evidence before the hearing committee. Suffice it to say that after considering the misconduct underlying the suspension, Diviacchi's own testimony, character references, and other evidence of Diviacchi's activities since his suspension, the hearing committee found that nothing of consequence had changed since Diviacchi's suspension or since the denial of his first petition for reinstatement. Before this court, Diviacchi makes virtually no effort to show that the single justice erred in determining that the hearing committee's findings were supported by substantial evidence, or that the hearing committee's conclusion, adopted by the board, and accepted by the single justice, that he is currently fit to practice law was error. Bare assertion is no substitute for evidence. 5

⁴ Diviacchi's suspension was not based on any criminal conviction, but on other wrongdoing established before the board. The distinction is of no moment for present purposes.

⁵ For example, Diviacchi does not challenge the hearing committee's decision, for reasons it fully explained, to give the letters he submitted as character references little or no weight; and he points to no evidence that the hearing committee erred in finding that his nonprofit charitable corporation serves as a platform for his own views rather than providing material help to other people.

Rather than focusing on the substantial evidence supporting the hearing committee's findings, Diviacchi complains about being made to prove his moral qualifications to a hearing committee that, in his view, is unqualified to decide this matter. He made a similar claim in the underlying disciplinary proceedings. See Diviacchi I, 475 Mass. at 1020 (noting "intemperate remarks disparaging the hearing committee's qualifications"). Nothing in Diviacchi's memorandum, however, demonstrates that either the hearing committee, the board or the single justice erred in finding him morally unqualified, nor does the evidence persuade us that he has led "a sufficiently exemplary life to inspire public confidence once again, in spite of his previous actions," notwithstanding their decisions.

Matter of Prager, 422 Mass. 86, 92 (1996), quoting Matter of Hiss, 368 Mass. at 452.

Diviacchi's remaining legal arguments are unavailing. argues that, although he was suspended for a fixed term, he is improperly being held to the same standard for reinstatement as an attorney who was disbarred or indefinitely suspended. our rules and our case law, however, plainly apply the same standard to those who are disbarred, indefinitely suspended, or suspended for a term of longer than one year, for purposes or reinstatement, while treating those suspended for shorter terms differently. S.J.C. Rule 4:01, § 18 (5). See, e.g., Matter of Wong, 442 Mass. 1016, 1017 (2004) (applying same standard to attorney disciplined by term suspension); Matter of Waitz, 416 Mass. 298, 304 (1993); Matter of Allen, 400 Mass. 417, 422 n.9 (1987) (noting issue, but assuming same on petitioner who has been indefinitely suspended or disbarred). We are unpersuaded that the rule is unjust merely because it draws a line at a oneyear suspension, as Diviacchi suggests.

Diviacchi also argues that he unfairly is being denied reinstatement due to his protected speech critical of the legal system and of the bar discipline process. Like any human institution, these systems are by no means perfect, and Diviacchi has the right to express his views, so long as he has a reasonable factual basis for his criticism. See Matter of Cobb, 445 Mass. 452, 467-475 (2005). The vituperative and hyperbolic manner in which he does so, however, need not be ignored. "[A]ttorneys are under an implied 'obligation . . . to maintain at all times the respect due to courts of justice and judicial officers. This obligation . . . includes abstaining out of court from all insulting language and offensive conduct toward judges personally for their judicial acts." Id. at 468, quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 355 (1871).

The hearing committee properly considered Diviacchi's open contempt for the legal system and the disciplinary system, and particulary his baseless accusation, made publicly and maintained on the Internet, that his suspension was based on "bigotry," merely because a committee member was absent for part of the proceedings. Indeed, that contempt remains evident in his memorandum before this court.

In sum, the hearing committee's determination that Diviacchi lacks the moral qualifications required to practice law was well supported, and there has been no error of law or abuse of discretion in so determining.

Competency and learning in the law. A petitioner seeking reinstatement also must demonstrate that he or she has the "competency and learning in law . . . required for admission to practice law in this Commonwealth." Matter of Waitz, 416 Mass. at 306, quoting S.J.C. Rule 4.01, § 18 (5). The board determined that, although Diviacchi has the "raw intellectual firepower to maintain his learning in the law," he had not done We agree. By the time of the hearing, Diviacchi had completed a course in practicing with professionalism, but he had undertaken no formal continuing legal education in any substantive legal subject. 7 It appears that he did engage in some informal efforts to learn about recent developments in the law, such as reviewing Massachusetts Lawyers Weekly and summarizing recent cases reported therein. As the hearing committee found, however, these efforts at most evinced a "superficial familiarity" with some recent decisions. Diviacchi's efforts were on a par with those deemed insufficient in Matter of Dawkins, 432 Mass. 1009, 1011 (2000), and less than those deemed insufficient in Matter of Waitz, 416 Mass. at 306. We agree that Diviacchi did not establish the learning in the law required for admission to practice.8

⁶ As the hearing committee noted, the board's rules permit an absent hearing officer to participate in deliberations as long as he or she has a copy of the transcript. See § 3.7(c) of the Rules of the Board of Bar Overseers.

⁷ Indeed, Diviacchi expressed disdain for continuing legal education, apparently regarding such courses as "schmooze sessions" rather than a valuable way to keep abreast of developments in the law.

⁸ After his appeal was entered in this court, Diviacchi moved for leave to take the July 2022 bar examination to

Effect of resumption of practice. Finally, we agree with the hearing committee, the board, and the single justice that Diviacchi has not shown that his "resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest." S.J.C. Rule 4.01, § 18 (5). "The act of reinstating an attorney involves what amounts to a certification to the public that the attorney is a person worthy of trust." Matter of Daniels, 442 Mass. 1037, 1038 (2004), citing Centracchio, petitioner, 345 Mass. 342, 348 (1963). "[T]he primary factor for the court's consideration 'is the effect upon, and perception of, the public and the bar.'" Daniels, supra, quoting Matter of Alter, 389 Mass. 153, 156 (1983). After hearing all the evidence, including Diviacchi's own testimony, and applying the correct legal standard, the hearing committee concluded that it could not recommend that he That recommendation, adopted by the board, is be reinstated. entitled to substantial deference. See Matter of Daniels, The hearing committee's reasoning bears repeating: supra.

"The public's respect for the attorney discipline system would be seriously eroded by reinstating an attorney who came before a reinstatement panel wholly unrepentant about the fact that he had ignored and then turned on a client by lying to a court in an effort to obtain from that client a fee that was not contemplated in the fee agreement. It would find wholly unpersuasive the certification, implicit

establish his competency, arguing that because he was previously admitted to the bar and has been suspended, he is ineligible to do so without a waiver of applicable rules. A single justice of this court denied the motion, and Diviacchi did not appeal from that ruling. This does not preclude Diviacchi from applying to our rules committee for leave to take a bar examination in support of a future petition for reinstatement. See Matter of Swanson, 483 Mass. 1022, 1023 (2019) (rules committee has inherent power to waive rules where justice and equity require). Moreover, as we have concluded that Diviacchi lacks the moral qualifications to be reinstated at this time, we decline his invitation to reinstate him conditioned on passing the bar examination.

Diviacchi has also filed a motion to expand the record to include evidence that he recently passed the bar examination in another State. Such evidence was not before the hearing committee, and we do not consider it.

in the reinstatement process, that a reinstated attorney is worthy of being held out to the public as trustworthy. . . .

"Likewise, the bar could hardly take the process of discipline and reinstatement seriously if we recommended reinstatement on this record. The petitioner's vengeful and unrepentant attitude towards his client, his refusal to acknowledge wrongdoing, his insincere 'acceptance' of responsibility by saying that his only mistake was to accept engagement by a client who was not worthy of him, and his superior and dismissive attitude toward continuing legal education are the antithesis of the model for reinstatement.

"Finally, the petitioner's reinstatement would run counter to the established precedent discussed above and would run counter to the fair and even-handed administration of justice. In this regard, we bear in mind that nothing of substance has changed since the petitioner's first reinstatement petition was denied; a recommendation to the contrary here would be inconsistent and indefensible."

The board's recommendation that Diviacchi not be reinstated, and the single justice's decision denying reinstatement, are amply supported by the record. Giving due deference to the board's recommendation, we conclude that the single justice did not err or abuse his discretion in denying reinstatement.

Judgment affirmed.

The case was submitted on the record, accompanied by a memorandum of law.

Valeriano Diviacchi, pro se.